



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1642

ST. REGIS PAPER COMPANY, A Corporation
Petitioner

v.

RAY MARSHALL, Secretary of Labor, *et al.*
Respondents

**PETITION FOR REHEARING OF ORDER
DENYING WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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The Petitioner respectfully prays, pursuant to Rule 58.2., for Rehearing of the Order of the Court entered October 1, 1979, denying Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Doctrine of Exhaustion of Administrative Remedies Should Not be Applied Where an Administrative Agency is Attempting to Impose Requirements in Conflict with a Federal Statute.

2. An Administrative Agency Should Not Be Permitted to Use the Doctrine of Exhaustion of Administrative Remedies as a Tool for Extorting Unauthorized Remedies.

3. No Person Should Be Required to Exhaust Administrative Remedies Where it is Clear and Apparent that the Administrative Tribunal Has Already Taken a Fixed Public Position on the Issues Involved and Is Incapable of Making an Impartial Decision.

I.

The Doctrine of Exhaustion of Administrative Remedies Should Not Be Applied Where An Administrative Agency Is Attempting To Impose Requirements In Conflict With a Federal Statute

The presently pending administrative proceedings resulted from a Show Cause Notice dated May 14, 1976 (Appendix F, p. 40a, Petition for Writ of Certiorari) requiring Petitioner to provide "make whole" remedies which

should include, but will not be limited to, employment and retroactive awards of pay and service credits

to an alleged affected class of female applicants and incumbents, because of an alleged "underutilization" of females. The imposition of such remedies by the Office of Federal Contract Compliance Programs ("OFCCP") violates standards of proscribed conduct

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2. It violates such standards because the requirement to hire more females and grant them retroactive pay awards or service credits (retroactive seniority) will necessarily infringe on the job and priority appointments of non-members of the "affected class". These standards are:

1. Failing or refusing to hire any individual, or discriminating against any individual, with respect to his compensation, terms, conditions or privileges of employment, because he is of the male gender [Sec. 703.(a)(1), 42 U.S.C. § 2000e-2(a)(1)];

2. Limiting, segregating or classifying employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because he is of the male gender [Sec. 703.(a)(2), 42 U.S.C. § 2000e-2(a)(2)];

3. Acting in derogation of the terms of a bona fide seniority or merit system by giving preference due to gender [Sec. 703.(h), 42 U.S.C. § 2000e-2(h)]; and

4. Requiring an employer to grant preferential treatment to a female because of her sex on account of an imbalance which may exist with respect to the total number or percentage of . . . [females] employed by any employer . . . in comparison with the total number or percentage of . . . [females] in any community, State, section, or other area, or in the available work force in any community, State, section or other area [Sec. 703.(j), 42 U.S.C. § 2000e-2(j)].

The majority opinion in the Court's recent decision in *United Steelworkers of America v. Weber*, —

U.S. —, 99 S.Ct. 2721 (1979), would, it may be assumed, permit private *voluntary* sex-conscious affirmative action which adversely affects other classes of employees [99 S.Ct. at 2728-30]. However, the majority of the Court made it clear that it would not *require* such action because of a *de facto* imbalance in the employer's workforce [99 S.Ct. at 2729].

Justice Rehnquist noted in his dissenting opinion that Kaiser and the Steelworkers acted under pressure from an OFCC charge of underutilization of minorities [99 S.Ct. at 2749]. In this case, OFCCP threatened Petitioner with debarment from government contracts which would be very costly to Petitioner. This was done to force or require Petitioner to enter into a "Conciliation" agreement providing for hiring more females and to impose retroactive pay awards and seniority rights for these and other females. This is the antithesis of "voluntary" action. This is precisely the type of pressure that Section 703.(j), and implicitly Sections 703.(a) and (d) of Title VII, were intended to prevent.

In *International Brotherhood of Teamsters v. United States*, — U.S. —, 97 S.Ct. 1843 (1977), the Court dealt with Section 703.(h), noting that its

unmistakable purpose . . . was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII [97 S.Ct. at 1863].

Title VII was not intended to "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act [97 S.Ct. at 1863]".

Title VII cannot be used, therefore, to "place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority [*Id.*]".

Again, sex cannot be used as a basis for preference except presumably on a wholly voluntary basis.

It is clear that the OFCCP is attempting to impose on Petitioner, as exemplified by its show cause notice of May 14, 1976, remedies in the nature of affirmative action granting a preference to females solely because they are females, and in derogation of a bona fide seniority system. Reading *Weber* and *Teamsters* together, a federal agency lacks statutory authority to impose such remedies.

Under such circumstances, Petitioner should not be required to exhaust its administrative remedies inasmuch as requiring it to do so would only serve to support a statutory violation by OFCCP.

II.

An Administrative Agency Should Not Be Permitted to Use the Doctrine of Exhaustion of Administrative Remedies as a Tool for Extorting Unauthorized Remedies

The remedies sought by the OFCCP from Petitioner are neither authorized by the Executive Order, nor permitted by Title VII. Disregarding this, the Department of Labor, through its Office of Federal Contract Compliance Programs, has used the threat of loss of Government contracts to extort such unauthorized and unlawful remedies from Petitioner and thousands of other Government contractors. Government contractors

are told it is a cost of doing business, and in fact, a condition for continuing to do business, with the Federal Government. The Government knows full well that many contractors cannot afford the cost of the protracted discovery and even more protracted "trials" before the administrative tribunals to which the contractor will be subjected if it fails to yield to OFCCP's demands.

The Government persists in ignoring rules of reasonable discovery limitations in these cases, often forcing contractors to provide it with documents by the thousands and hundreds of thousands, the bulk of which have no relevance in time or subject matter to the deficiencies allegedly existing in the contractor's AAP. It must be evident to the Court from the number of suits pending in the Federal courts stemming from OFCCP's unfettered methods of pursuing alleged "non-complying" contractors that something is wrong with the system. Unfortunately, there are many more contractors who bend to OFCCP's threats and provide these unauthorized and unlawful remedies under the guise of "Conciliation Agreements". The pressure that OFCCP can bring to bear on contractors is so great as to inhibit most contractors from risking debarment and other sanctions in order to attempt to assert legal and due process rights in the Courts. The only course now available to a contractor is to go through a long, burdensome, and costly administrative proceeding whose outcome is foreordained. The result is foreordained because the Agency, by regulation, has provided for these unlawful remedies and is certainly not going to rule contrary to its own published policies. Petitioner, and other Government contractors, should

not be required to pursue meaningless, expensive, and almost interminable administrative proceedings before having their day in court.

III.

No Person Should Be Required to Exhaust Administrative Remedies Where It Is Clear and Apparent That the Administrative Tribunal Has Already Taken a Fixed Public Position On the Issues Involved and Is Incapable Of Making An Impartial Decision

The Administrative Hearing is presided over by an Administrative Law Judge employed by the Department of Labor. These judges consider themselves bound by the regulations of the Department of Labor, and as pointed out in the Petition for Writ of Certiorari, they refuse to deal with the issue of the legality of the regulations which are presumably implementing the Executive Order.

There is no likelihood in the administrative proceeding for a ruling favoring a contractor and certainly not on policy matters covered by existing regulations such as is the case here.

The record of the administrative proceedings in this case, as well as the record of administrative proceedings in cases involving other contractors, make it apparent that an impartial tribunal is not provided and due process is not observed. Under such prejudicial circumstances, Petitioner and other Government contractors clearly should not be required to submit themselves to such a costly and prolonged proceeding as a condition precedent to obtaining a ruling on these important legal issues in the Federal courts.

CONCLUSION

For the reasons stated, we ask that the petition be reconsidered by the Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Guy Farmer, counsel of record for St. Regis Paper Company, does hereby certify that the Petition for Rehearing to which this certificate is attached is presented in good faith and not for delay. I further certify that said Petition is restricted to a discussion of substantial grounds available to Petitioner which were not previously presented in its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

GUY FARMER